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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 627

In the matter of the application of New York County Lawyers Association to punish for contempt and to enjoin the unlawful practice of the law by Lorenzo J. Roel.

LORENZO J. ROEL,

Appellant,

v.

NEW YORK COUNTY LAWYERS ASSOCIATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinions Below	2
Nature of Proceeding	2
Date and Time of Entry of Order Appealed From	2
Statute Conferring Jurisdiction of Appeal	3
Cases Believed to Sustain the Jurisdiction	3
State Statute Involved	4
The Questions Presented by the Appeal	5
Statement of the Case	5
(1) Undisputed Facts	5
(2) The Decision of the N. Y. Courts	6
(3) The Federal Questions Raised Below	7
The Federal Questions Involved are Substantial and Deserve Plenary Consideration	9
Summary of Appellant's Argument	11
I. Section 270 of the New York Penal Law, in excluding appellant because of his alienage from the occupation of giving advice to the public on foreign law, violates the Due Process Clause	12

PAGE

A. A State cannot exclude aliens from an occupation unless such exclusion may reasonably be said to protect the public welfare 13

B. Under the decisions of this Court, the test for determining whether a State may, for the protection of the public welfare, exclude aliens from an occupation is whether aliens are, as a class, "the peculiar source of the evil" at which the Statute excluding them is aimed.. 14

C. Since Section 270 of the New York Penal Law, in so far as it relates to foreign law, is aimed at the evil of erroneous advice on foreign law given by ignorant or dishonest persons, it is absurd to say that aliens are, as a class, "the peculiar source of the evil" at which this Statute is aimed 15

D. The fact that a State may constitutionally exclude aliens from holding public office, including the office of attorney-at-law, is no reason for saying that aliens may constitutionally be excluded from the occupation of giving advice to the public on foreign law .. 16

II. Section 270 of the New York Penal Law, in excluding appellant from the occupation of giving advice on foreign law because he does not know New York law, violates the Due Process Clause 18

A. The purpose of Section 270 of the New York Penal Law to protect the public against incorrect advice on foreign law is not served in any way by requiring knowledge of domestic law as a condition to engaging in the occupation of giving advice on foreign law 18

PAGE

B. Requiring a foreign lawyer to know New York law as a condition to giving advice on foreign law is just as unreasonable as requiring a New York lawyer to know foreign law as a condition to giving advice on New York law 20

C. The fact that persons practicing such specialties as Federal law, patent law, mining law or real estate law are reasonably required to have general knowledge of New York law such as is required for admission to the New York Bar is no reason for requiring that persons giving advice on foreign law also have such general knowledge of New York law 22

Conclusion 26

Appendix A 27

Appendix B 39

Table of Cases

PAGE

American Communications Ass'n v. Douds, 339 U. S. 382 ..... 13, 14
Banghart v. Walsh, 339 Ill. 132 19
Berry v. Sommers, 76 Ida. 446 20
Burns Baking Co. v. Bryan, 264 U. S. 504 18
Butler v. Michigan, 352 U. S. 380 24
Nebbia v. New York, 291 U. S. 502 18
Patsone v. Penn., 232 U. S. 138 14
People v. Crane, 214 N. Y. 154 14
People v. Culkin, 248 N. Y. 465 ..... 12, 16
People v. Ringe, 197 N. Y. 143 19
Schware v. Board of Bar Examiners, 353 U. S. 232 .. 11
Takahashi v. Fish & Game Com., 334 U. S. 410 13
Templar v. State Board, 131 Mich. 254 16
Toomer v. Witsell, 334 U. S. 385 15
Truax v. Raich, 239 U. S. 33 13
Yick Wo v. Hopkins, 118 U. S. 356 13

Statutes

N. Y. Judiciary Law, Sec. 750-B 2
N. Y. Judiciary Law, Sec. 460 5
N. Y. Penal Law, Sec. 270 4

Text Books

Wigmore on "Evidence" 23

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NEW YORK COUNTY LAWYERS ASSOCIATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from a final order of the New York Court of Appeals, the New York court of last resort, and submits this Statement, pursuant to Rule 15, to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial Federal questions are presented.

Opinions Below

The opinion of the New York Court of Appeals and the dissenting opinion are reported in 3 N. Y. 2d 224; 165 N.Y.S. 2d 31; 144 N. E. 2d 24. A copy of these opinions is appended hereto, marked "Appendix A." The opinion of the Appellate Division of the New York Supreme Court is reported in 3 A. D. 2d 742; 160 N.Y.S. 2d 982. The opinion of the Special Term of the New York Supreme Court is reported in 4 Misc. 2d 728; 156 N.Y.S. 2d 651.

Nature of Proceeding

This special proceeding was brought by appellee under Section 750-B of the New York Judiciary Law which provides, so far as pertinent here, as follows:

> "* * * the Supreme Court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted * * * by any bar association incorporated under the laws of this state."

Appellee's petition to the New York Court prayed that appellant, a resident Mexican lawyer, be adjudged in contempt of Court for practicing law without a license, in giving advice to the public on Mexican law, and that he be enjoined from such practice except as a consultant to members of the New York Bar (fols. 37-8, 59).

Date and Time of Entry of Order Appealed From

The order of the New York Court of Appeals sought to be reviewed (Appendix "B" annexed) was dated and entered July 3, 1957. The notice of appeal was filed August

12, 1957, in the Supreme Court of the State of New York in the office of the Clerk of that court, New York County, who is "the clerk of the court possessed of the record," as provided in Rule 10.

Statute Conferring Jurisdiction of Appeal

Title 28 of the United States Code, Section 1257 (2), is believed to confer on this Court jurisdiction of the appeal. It provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Cases Believed to Sustain the Jurisdiction

Truax v. *Raich,* 239 U. S. 33;
Yick Wo v. *Hopkins,* 118 U. S. 356;
American Communications Assn. v. *Doud,* 339 U. S. 382;
Burns Baking Co. v. *Bryan,* 264 U. S. 504;
Schware v. *Board of Bar Examiners,* 353 U. S. 232;
Nebbia v. *New York,* 291 U. S. 502;
Butler v. *State of Michigan,* 352 U. S. 380;
Takahashi v. *Fish & Game Com.,* 334 U. S. 410;
Toomer v. *Witsell,* 334 U. S. 385;
Patsone v. *Penn.,* 232 U. S. 138.

State Statute Involved

Section 270 of the New York Penal Law, the constitutionality of which, as applied to appellant, is drawn in question, is as follows (McKinney's Consolidated Laws of New York, Book 39, Part 1, Sec. 270):

> "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attorney and counselor at law for a person other than himself in a court of record in this state or in any court in the city of New York, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any lanuage, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts, or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred and sixty-eight of the judiciary law and filed the same in the office of the clerk of the court of appeals as required by said section. Provided, however, that nothing in this section shall be held to apply to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred twenty-one of the membership corporations law."

The Questions Presented by the Appeal

The primary question involved in this appeal may be stated as follows: Does Section 270 of the New York Penal Law, construed by the New York courts as forbidding foreign lawyers to engage in the occupation of giving advice to the public on foreign law because they are not licensed members of the New York Bar, violate the Due Process Clause? Since such license requires (1) American citizenship (N. Y. Judiciary Law, Sec. 460) and (2) knowledge of New York law, Section 270 of the New York Penal Law, as construed by the New York Courts, necessarily excludes all aliens from the occupation of giving advice to the public on foreign law and also excludes from such occupation all persons having no knowledge of New York law. Hence, the primary question stated above involves the following questions:

I. Does Section 270 of the New York Penal Law, in excluding appellant because of his alienage from the occupation of giving advice to the public on foreign law, violate the Due Process Clause?

II. Does Section 270 of the New York Penal Law, in excluding appellant from the occupation of giving advice to the public on foreign law because he does not know New York law, violate the Due Process Clause?

Statement of the Case

(1) Undisputed Facts.

The facts are simple and undisputed. They are as follows:

Appellant, a Mexican citizen and member of the Mexican Bar (fols. 116, 119), resides in New York City where, for forty-four years, he has engaged in his occupation of giving advice on Mexican law and drawing instruments under such law for use in Mexico (fols. 40-41). He deals with lawyers and laymen (fol. 37). He inserts an item

in newspapers simply stating that he is a "Mexican lawyer in N. Y." (fol. 65). He has not become an American citizen because he would thereby cease to be a "Mexican lawyer", membership in the Mexican Bar being restricted to Mexican citizens (fol. 119). As expressly stated in the opinion of the New York Court of Appeals, "appellant concededly does not give any advice as to New York law" (3 N. Y. 2nd at p. 228) and carefully warns his clients that he is qualified to advise only on Mexican law and not as to the effect of Mexican law in New York or as to the validity in New York of legal proceedings in Mexico (fols. 129, 135, 171, 176). A part of his occupation consists of giving advice on Mexican divorce law and obtaining Mexican divorces for citizens of New York through his associate in Mexico (fol. 213).

(2) The Decision of the New York Courts.

The Special Term of the New York Supreme Court, the court of first instance, adjudged appellant in contempt of court "for his unlawful practice of law in violation of Section 270 of the Penal Law of the State of New York" (fol. 13) and enjoined him from such practice (fol. 18) except as a consultant to members of the New York Bar (fol. 19). The New York courts did not pass upon the question whether this Statute contains any such exception of advice to New York lawyers, since

> "petitioner does not seek to enjoin respondent from giving advice on Mexican law to members of the New York Bar, so it is unnecessary to consider whether such activities also constitute the practice of law" (fols. 253-4).

The above decision of the Special Term of the New York Supreme Court was affirmed by the Appellate Division of the New York Supreme Court and by the New York Court of Appeals, the highest Court of the State, the latter Court saying:

"The question here presented is whether appellant, because he is practicing exclusively foreign law, is violating Section 270 of the Penal Law by practicing law in this State without being licensed to do so." (3 N. Y. 2d at p. 229).

The New York courts have thus construed Section 270 of the New York Penal Law as applying to foreign lawyers and foreign law as well as to New York lawyers and New York law.

(3) The Federal Questions Raised Below.

All the questions upon which appellant now seeks a review by the Supreme Court were raised and decided against appellant by the New York State courts, as appears from the opinions below. The opinion of the New York Supreme Court at Special Term states (fols. 261-5):

"In his reply brief served on the day of argument, almost three months after the institution of this proceeding, respondent belatedly asserts a constitutional question. Respondent urges that if Penal Law, Section 270, is construed to prohibit respondent's activities, he would be deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution and Article I, Section 6, of the New York Constitution.

"But it is well settled that 'There is no inherent right to admission to the bar' (*Brooks* v. *Laws,* 208 F. 2d 18, 28 (C. A. D. C., 1953) and that 'The State has the right to prescribe the qualifications of those who practice law' (*Divine* v. *Watauga Hospital,* 137 F. Supp. 628, 632 (M.D.N.C.), 1956).

"In *In re Summers* (325 U. S. 561, 1945), the United States Supreme Court held that it was not a violation of due process for Illinois to deny admission to the Bar to one who refused to take the oath of allegiance

to Illinois as that state interpreted such oath. This case has been cited with approval by New York Courts (*Matter of L'Hommedieu* v. *Board of Regents*, 278 App. Div. 494, 504, 3d Dept., 1950, aff'd 301 N. Y. 476, 1950, aff'd 342 U. S. 951, 1952; *Thompson* v. *Wallin*, 196 Misc. 686, 695, 1949, aff'd 276 App. Div. 463, 3d Dept., 1950, aff'd 301 N. Y. 476, 1950, app. dis. 342 U. S. 801, 1951), in holding that it is not unconstitutional to require teachers to be loyal. As a consequence of the foregoing, an alien has no constitutional right to practice law in this jurisdiction.

"Respondent also claims that it is unconstitutional to require a person who wants to practice 'Mexican law' in New York to learn New York law and become a member of the New York Bar, because there is 'no reasonable relation between the evil and the purported cure' (*Matter of Stubbs* v. *Adamson*, 20 N. Y. 459, 469, 1917). He contends that the 'evil' is having the public advised on foreign law by persons not skilled therein. But the state also regards it of paramount importance that persons not subject to the disciplinary and ethical requirements of our Bar should not act as attorneys here (see *Matter of Co-operative Law Co.*, 198 N. Y. 479, 483, 1910). The 'evil' is prevented by requiring admission to the New York Bar of all persons who wish to practice law in this state.

"Accordingly, the respondent is adjudged in criminal contempt. He will be permanently enjoined from committing within the State of New York any of the acts described in the prayer for relief in the petition. No fine will be imposed, however."

On appeal to the Appellate Division of the Supreme Court, appellant raised the same Federal questions on the oral argument and in his brief; but the short memorandum opinion of the Appellate Division does not refer to them. However, the opinion of the Court of Appeals

expressly passed upon these questions which were presented orally and in appellant's briefs, as appears from the opinion of that Court (3 N. Y. 2d at pp. 228, 232-3):

> "Appellant asserts that the fact that his practice is restricted to Mexican law makes the provisions of Section 270 inapplicable to him. He urges that * * * (3) if he is subject to Section 270 of the Penal Law, that statute is unconstitutional" * * *
>
> "We see no substance in appellant's claim that Section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law, in that the statute as so construed is unreasonable and serves no public purpose. * * *
>
> "Accordingly, the appeal taken as of right should be dismissed on the ground that no substantial constitutional question is involved; as to the appeal taken pursuant to leave, the order appealed from should be affirmed."

Since, then, the questions, review of which is here sought, were raised and decided by the New York State Courts, they are properly reviewable by the Supreme Court.

The Federal Questions Involved Are Substantial and Deserve Plenary Consideration

This case presents the important question, What are the constitutional rights of resident foreign lawyers? May they constitutionally be excluded from their occupation of giving advice to the public on foreign law by a statute forbidding them to give such advice because they are not members of the New York Bar which they cannot join unless and until they become American citizens (thus ceasing to be foreign lawyers) and spend years studying New York law?

Not only is the occupation of every foreign lawyer in the United States involved in this case but, as the dissenting

opinion in the New York Court of Appeals points out, there is involved the interests of the "large and increasing number of our nationals who engage in transactions in foreign countries" and who need "legal advice * * * concerning these far-flung enterprises by trained lawyers from abroad who are equipped to give accurate information and opinions regarding them" (Van Voorhis, J., 3 N. Y. 2nd, at pp. 235, 236). As also pointed out in the dissenting opinion, the decision of the New York courts, in this case, is likely to provoke retaliatory measures in foreign countries against American lawyers abroad. The dissenting opinion says, in respect of this matter (p. 235):

> "We are told and have no reason to doubt that many law firms in New York have offices in other cities, such as Washington, Boston, London and Paris and that many have foreign associates who are not licensed to practice in New York. The ethical propriety of such arrangements has always been recognized, provided that it is made clear in each jurisdiction that unlicensed foreign associates are not permitted to practice in that jurisdiction. *The performance of such services by American lawyers in Great Britain, France or Germany, for example, would be precluded by the application in those jurisdictions of the doctrine now announced by the majority of this court.*" (Emphasis supplied.)

As also said in the dissenting opinion (p. 234):

> "The serious consequences of the full reach of this injunction should not be obscured by the ill repute of Mexican divorces. Our eyes should be open to the circumstances cited by the Association of the Bar of the City of New York in support of a modification, that the principle underlying this injunction also prevents the giving of legal advice in this State on other subjects than divorce by lawyers of other countries regarding business, financial or personal transactions anywhere in the world."

Summary of Appellant's Argument

Appellant's argument on this appeal may be summarized as follows:

Section 270 of the New York Penal Law, as construed by the New York Courts, excludes appellant from his occupation of giving advice to the public on Mexican law because he is not a member of the New York Bar. Membership in the New York Bar requires (1) American citizenship and (2) knowledge of New York law. Since appellant is an alien and has no knowledge of New York law, Section 270 of the New York Penal Law excludes him from such occupation because of his alienage and also because he has no knowledge of New York law. But neither American citizenship nor knowledge of New York law has any "rational connection with appellant's fitness or capacity" to give advice on foreign law. Hence appellant cannot lawfully be excluded from such occupation either because he is an alien or because he has no knowledge of New York law and, therefore, cannot lawfully be forbidden to engage in such occupation because he is not a member of the New York Bar. As said by this Court in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-9:

> "A State cannot exclude a person from * * * any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment * * * any qualification must have a rational connection with the applicant's fitness or capacity * * *."

Appellant does not question the constitutionality of the requirement that members of the New York Bar be American citizens since such membership is more than an occupation: it is a public office; and the office of attorney-at-law, as any other public office, may rationally be restricted to American citizens, since attorneys are officers

of the Court (*People* v. *Culkin*, 248 N. Y. 465, 470-1). That is, however, no reason for requiring foreign lawyers to be American citizens or officers of the Court in which they would never have any occasion to appear, in their occupation of merely giving advice on foreign law.

It is, therefore, submitted that Section 270 of the New York Penal Law, construed by the New York Courts as forbidding foreign lawyers to engage in the occupation of giving advice to the public on foreign law because they are not members of the New York Bar, violates the Due Process Clause of the Fourteenth Amendment in unlawfully excluding them from their occupation for reasons having no "rational connection with * * * fitness or capacity."

Appellant's argument, summarily stated above, is expanded below, with citation of supporting authorities.

ARGUMENT

I

Section 270 of the New York Penal Law, in excluding appellant because of his alienage from the occupation of giving advice to the public on foreign law, violates the Due Process Clause.

Appellant submits the following contentions in support of the proposition just stated above:

A. A State cannot exclude aliens from an occupation unless such exclusion may reasonably be said to protect the public welfare.

B. Under the decisions of this Court, the test for determining whether a State may, in the protection of the public welfare, exclude aliens from an occupation is whether aliens are, as a class, "the peculiar source of the evil" at which the Statute excluding them is aimed.

C. Since Section 270 of the New York Penal Law, in so far as it relates to foreign law, is aimed at the evil of erroneous advice on foreign law given by ignorant or dishonest persons, it is absurd to say that aliens, as a class, are "the peculiar source of the evil" at which this Statute is aimed.

D. The fact that a State may exclude aliens from holding any public office, including the office of attorney-at-law, is no reason for excluding them from the occupation of giving advice on foreign law.

A. A State cannot exclude aliens from an occupation unless such exclusion may reasonably be said to protect the public welfare.

It is well settled that the Due Process Clause protects aliens as well as citizens (*Truax* v. *Raich*, 239 U. S. 33, 39; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369), and that a State may not arbitrarily exclude aliens from any lawful occupation. In *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 391, this Court recently recognized the general rule that

> "The Constitution forbids arbitrary banning of aliens from the pursuit of lawful occupations."

In *Takahashi* v. *Fish and Game Com.*, 334 U. S. 410, this Court held that a State could not exclude aliens from the occupation of commercial fishing by the requirement of a license limited to citizens. This Court said (pp. 419-20):

> "The protection of this Section [now 42 U. S. C. Sec. 1981] has been held to extend to aliens as well as citizens. Consequently, the section and the Fourteenth Amendment upon which it rests, in part, protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color."

What is the test for determining whether the exclusion of aliens from an occupation is "arbitrary" and therefore

forbidden by the Fourteenth Amendment? Judge Cardozo stated it as follows in a New York case affirmed by this Court (*People* v. *Crane*, 214 N. Y. 154, 169, aff'd 239 U. S. 195):

> "There must, however, be some relation in such cases between the exclusion of the alien and the protection of the public welfare."

Unless, then, the exclusion of alien lawyers from the occupation of giving advice to the public on foreign law may protect the public welfare, such exclusion violates the Due Process Clause. It is submitted that, as a matter of law, such exclusion cannot possibly protect the public welfare, in any way, and is, therefore, unconstitutional.

B. Under the decisions of this Court, the test for determining whether a State may, for the protection of the public welfare, exclude aliens from an occupation is whether aliens are, as a class, "the peculiar source of the evil" at which the Statute excluding them is aimed.

In *Patsone* v. *Pennsylvania*, 232 U. S. 138, this Court said (p. 144):

> "* * * a State may classify with reference to the evil to be prevented and *if the class discriminated against is or reasonably might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out.* * * * The question therefore narrows itself to whether this Court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that *resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent.*" (Emphasis supplied)

In *American Communications Ass'n* v. *Douds*, 339 U. S. 382, this Court recently said (p. 391):

> "We have held that aliens may be barred from certain occupations because of a reasonable relation between that classification and the apprehended evil."

In *Toomer* v. *Witsell,* 334 U. S. 385, this Court said, in speaking of the provision of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" (Art. IV, Sec. 2), that the purpose of this provision was (p. 398)

> "to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the Statute is aimed."

True, the "non-citizens" in the above case were not aliens but citizens of another State; but its reasoning, we submit, applies equally to aliens and forbids excluding them from any occupation "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the Statute is aimed."

C. Since Section 270 of the New York Penal Law, in so far as it relates to foreign law, is aimed at the evil of erroneous advice on foreign law given by ignorant or dishonest persons, it is absurd to say that aliens are, as a class, "the peculiar source of the evil" at which this Statute is aimed.

As stated by the New York Court of Appeals, in this case, the purpose of Section 270 of the New York Penal Law is as follows (3 N. Y. 2nd at p. 231):

> "Protection of the members of the lay public of our State, when they seek *legal advice* * * * is the basis of the requirements of licensing of attorneys by the State, and this protection must be deemed to embrace whatever kind of law or legal rights the layman seeks advice on."

Obviously, the evil which this Statute seeks to protect the public against, in so far as foreign law is concerned,

is the harm which may result from incorrect advice on foreign law given by incompetent or dishonest persons. But is it not absurd to say that aliens are, as a class, more likely to give incorrect advice on foreign law through their incompetence or dishonesty, than citizens? On the contrary, it is only alien lawyers who know anything about foreign law or can give correct advice on such law. As for dishonesty, can anyone reasonably say that aliens, as a class, are more likely than citizens to give dishonest advice on foreign law? It is, then, we submit, wholly unreasonable and arbitrary for a State to exclude aliens, because of their alienage, from the occupation of giving advice on foreign law.

D. The fact that a State may constitutionally exclude aliens from holding public office, including the office of attorney-at-law, is no reason for saying that aliens may constitutionally be excluded from the occupation of giving advice to the public on foreign law.

Membership in a State Bar is more than an occupation: it is a public office and its members are officers of the Court. This is so in New York, as elsewhere (*People* v. *Culkin*, 248 N. Y. 465, 470-1). To say that all public officers, including members of the Bar, must be American citizens is no reason for saying that persons engaged in the occupation of giving advice to the public on foreign law should be American citizens and officers of the Court in which they have no occasion ever to appear; and is, therefore, no reason for excluding alien lawyers from the occupation of using their knowledge and training to give advice on foreign law.

That aliens may not constitutionally be excluded from an ordinary occupation, even though they may constitutionally be excluded from membership in the Bar because such members are officers of the Court was expressly held by the Michigan Supreme Court in *Templar* v. *State Board of Examiners*, 131 Mich. 254 (90 N. W. 1058) which declared unconstitutional a Michigan Statute licensing bar-

bers but limiting such license to American citizens. The Court said (pp. 257-9):

> "The attorney general contends that under the police power, the legislature may regulate callings, trades and professions and that it is not for the Courts to pass upon the wisdom of their regulations and that if such regulations result in excluding aliens from the privileges which citizens enjoy, it still should be held within the power of the legislature * * *. In the exercise of the police power the legislature had the undoubted right to require, as a prerequisite to his trade that he submit to an examination. But had it the right to require citizenship? If it had the right to couple that with other requirements, it would have the same right to make that the only requirement. In other words, it would have the right to exclude alien labor wholly. We think the cases cited demonstrate that it had not this power.
>
> "*A very different question is presented than in a case of requirements for admission to the bar, for example, as in such case the statute confers upon the applicant who is admitted to the profession an office. He becomes an officer of the Court* * * * the relator's business is in no way injurious to the morals, the health, or even the convenience of the community; provided only he has the requisite knowledge upon the subjects prescribed by the legislature to practice his calling without endangering the health of his patrons. To hold that he is not entitled to practice this calling because not a full citizen of the United States is to deny to him rights which we think are preserved by the fourteenth amendment." (Emphasis supplied)

It is, then, submitted that Section 270 of the New York Penal Law is unreasonable and unconstitutional in excluding aliens from the occupation of giving advice to the public on foreign law.

II

Section 270 of the New York Penal Law, in excluding appellant from the occupation of giving advice on foreign law because he does not know New York law, violates the Due Process Clause.

It is, of course, well settled that "a state may not, under the guise of protecting the public, * * * prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them" (*Burns Baking Co. v. Bryan*, 264 U. S. 504, 513). As this Court said in *Nebbia* v. *New York*, 291 U. S. 502, 525:

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be obtained."

Is it a reasonable restriction for a State to forbid foreign lawyers to give advice on foreign law because they do not also know New York law? The test laid down by this Court for determining this question is whether this restriction "really tends to accomplish the purpose for which it was enacted" (*Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, cited above) or has a "real and substantial relation to the object sought to be attained" (*Nebbia* v. *New York*, 291 U. S. 502, 525, cited above). Let us apply that test here.

A. The purpose of Section 270 of the New York Penal Law to protect the public against incorrect advice on foreign law is not served in any way by requiring knowledge of domestic law as a condition to engaging in the occupation of giving advice on foreign law.

As seen above, the purpose of Section 270 of the New York Penal Law, in so far as it relates to foreign law, is to prevent the evil of incorrect advice on foreign law. This Court will take judicial notice that domestic law and for-

eign law are so different that knowledge of one is no qualification whatsoever with respect to the other. Indeed, most foreign law (including the Mexican law involved in this case) does not arise out of or rest upon the English common law upon which domestic law is based. Is it not, then, absurd to say that a foreign lawyer, trained in the law of his foreign country, cannot give advice on such foreign law without first spending years studying our domestic law? On this theory, an American citizen who goes abroad and there consults the leader of the Bar in some foreign country cannot get proper advice on the law of such foreign country because this eminent foreign lawyer does not also know American law.

It has been held by many courts that a person desiring to engage in one occupation cannot be required to have knowledge of a different occupation, and that a State statute imposing such requirement is unconstitutional. Indeed, the New York Court of Appeals, in a decision which its opinion in the case at bar seems to ignore, has so held. In *People* v. *Ringe*, 197 N. Y. 143, it was held that a statute requiring undertakers to be licensed embalmers "unnecessarily interferes * * * with that liberty of person and property guaranteed by the Constitution" (p. 149). It was so held, in the case cited, although the Court recognized that "the work of an embalmer and that of an undertaker can, in most instances in the interests of economy and that orderly procedure desirable in the performance of such work, be done by the same person" (p. 149). The Court said that "when such work (of embalming) is desired, a proper person can be procured to perform it" (p. 150).

In *Banghart* v. *Walsh*, 339 Ill. 132 (171 N. E. 154), the Illinois Supreme Court held that an Illinois statute requiring beauty culturists to have a barber's license was a violation of the Due Process Clause. The Court said (pp. 140-1):

> "It is unreasonable to require * * * a thing entirely foreign to the trade for which they (beauty culturists) desire to qualify * * * Section 18 * * * deprives them of their liberty and property without due process of law."

In *Berry* v. *Sommers,* 76 Idaho, 446 (283 Pac. 2nd 1093), the Idaho Supreme Court held that the Legislature could not require dental mechanics to be licensed dentists. The Court said (pp. 451-2):

> "The amendment attempts the further regulation of such calling so as to require the dental mechanic or technician * * * to be possessed of the education and training of a dentist and to be licensed as a dentist. * * * Any such educational requirement and licensing as a dentist, as a prerequisite for performance of such services so performed by appellants and others similarly situated is not a reasonable regulation and is not reasonably necessary for the protection of the public. * * * The act is unconstitutional and void."

B. Requiring a foreign lawyer to know New York law as a condition to giving advice on foreign law is just as unreasonable as requiring a New York lawyer to known foreign law as a condition to giving advice on New York law.

Obviously, a New York lawyer cannot be required to know foreign law as a condition to giving advice on New York law, even though his client's problem often may involve both New York law and foreign law, upon which latter he cannot advise. Is it not, then, unreasonable to require a foreign lawyer to know New York law just because his client's problem may involve both foreign law and New York law?

The opinion of the New York Court of Appeals, in the case at bar, states (3 N. Y. 2nd at p. 231):

> "To allow a Mexican lawyer to arrange the institution of divorce proceedings for a New York resident

> in a Mexican Court, without allowing him to tell the client that the divorce might be invalid (*Querze* v. *Querze*, 290 N. Y. 13) or that it might adversely affect estate or other property rights or status in this State (*Matter of Rothscheck*, 300 N. Y. 346), is to give utterly inadequate protection to him."

And what is the remedy of the New York Court of Appeals for the "utterly inadequate protection" said to be given to New York residents by Mexican lawyers because they cannot advise such residents as to the validity or effect of Mexican divorces in New York? It is to construe Section 270 of the New York Penal Law in such a way that it prevents New York residents from consulting a Mexican lawyer who knows Mexican law and forces them to consult a New York lawyer who not only knows nothing about Mexican law but cannot consult a Mexican lawyer in New York because this statute, if it forbids Mexican lawyers to advise laymen, also forbids them to advise lawyers, since advising lawyers is practicing law just as much as advising laymen, as the dissenting opinion below points out (3 N. Y. 2d at p. 235).

We respectfully submit that Section 270 of the New York Penal Law, as construed by the New York Courts, protects New York lawyers but gives "utterly inadequate protection" to New York residents. As said in the dissenting opinion, this "would tend to justify the charge that the motive of such restriction is 'feather bedding'" (3 N. Y. 2d at p. 236). On the other hand, a Mexican lawyer who tells his divorce clients, as appellant admittedly does, in writing signed by such clients (fols. 214-15), that he "is qualified to advise on Mexican law but on no others" and "assumes no responsibility for the validity or legal effect of the final decree in the several American states" thereby gives such clients all the protection they need.

We further submit that the foregoing reasoning of the New York Court of Appeals leads to the absurd

result that a New York resident who goes to Mexico and consults the most eminent lawyer in Mexico receives from such leader of the Mexican Bar "utterly inadequate protection" because this Mexican lawyer does not know New York law; but if this same New York resident, instead of consulting a Mexican lawyer in Mexico or in New York, will only go to any member of the New York Bar, no matter how ignorant of Mexican law he may be, he will receive "adequate protection"!

C. The fact that persons practicing such specialties as Federal law, patent law, mining law or real estate law are reasonably required to have general knowledge of New York law such as is required for admission to the New York Bar is no reason for requiring that persons giving advice on foreign law also have such general knowledge of New York law.

The New York Court of Appeals says, in its opinion in the case at bar (3 N. Y. 2nd at pp. 230, 233):

> "In dealing with the question as to what constitutes the unauthorized practice of law, we have not limited the practice of law to New York law. Thus persons or corporations engaging in the practice of Federal law have been found violating the statute.
>
> • • •
>
> "The State need not have separate examinations for those who will specialize in real estate law, patent law, mining law, foreign law, or any other law. There are many branches of the law that a Bar examination does not reach, but the test is a general one which all qualified applicants are required to take. And so all are equally subject to the same character qualifications. Thus it is not unreasonable to require that a person desiring to engage in the practice of foreign law be admitted to the Bar here and be subject to the same rules as every other member of the Bar of this State."

As the above quotations show, the reasoning of the New York Court of Appeals is as follows:

1. Since persons practicing Federal law in New York are reasonably required to be members of the New York Bar, even though Federal law is not "New York law", persons practicing foreign law in New York may likewise reasonably be required to be members of the New York Bar, even though foreign law is not "New York law."

2. Since persons practicing "real estate law, patent law, mining law" are required to pass the New York Bar examinations, although these specialties are "branches of the law that a Bar examination does not reach", persons practicing foreign law may likewise be required to pass the New York Bar examinations, although foreign law is likewise a "branch of the law that a Bar examination does not reach".

It is respectfully submitted that the above reasoning of the New York Court of Appeals is unsound. In the first place, it erroneously assumes that Federal law is not "New York law". Since, however, Federal law is binding in New York, it is as much "New York law" as a statute enacted by the New York Legislature or a decision of the New York Court of Appeals. Hence the Court's likening of foreign law to Federal law rests upon the false premise that Federal law, like foreign law, is not New York law. As said by Wigmore in his work on *"Evidence"*, Vol. 9, Sec. 2573 (p. 556):

> "The Federal laws of the United States * * * are equally the laws of each State."

In the second place, Federal law, patent law, mining law, and real estate law are not only branches of New York law but are so related to, and interwoven with, other New York law that one cannot give sound advice on any of these "specialties" of New York law unless he also has a general knowledge of New York law, as a whole,

such as is required for admission to the New York Bar; and it is therefore reasonable to require that such persons be members of the New York Bar. Obviously, however, foreign law is neither a branch of New York law nor so interwoven with New York law that one cannot give sound advice on foreign law without a general knowledge of New York law. New York law simply has no relation to foreign law and knowledge of New York law is no aid whatsoever to giving sound advice on foreign law. Hence it is unreasonable to require knowledge of New York law as a condition to giving advice on foreign law.

If, as we have submitted above, it is unconstitutional to require that foreign lawyers cease being foreign lawyers, become American citizens and acquire knowledge of New York law as a condition to giving advice on foreign law, Section 270 of the New York Penal Law is not saved from such unconstitutionality merely because, in requiring that foreign lawyers be members of the New York Bar, it thereby assures that they be of good character. Membership in the New York Bar requires American citizenship and years of study of New York law, as well as good character. To require the former of foreign lawyers in order to accomplish merely the latter is chopping off the head to cure a headache or "burning down the house to roast the pig", as this Court recently said, in *Butler* v. *State of Michigan*, 352 U. S. 380, holding a Michigan statute unconstitutional which forbade the sale of certain books to anybody, either adults or minors, merely to protect the latter.

This Court said (p. 382):

> "It is clear in the record that appellant was convicted because Michigan, by Sec. 343, made it an offense for him to make available for the general public (and he in fact sold to a police officer) a book that the trial judge found to have a potentially deleterious influence upon youth. The State insists that

by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general walfare. *Surely, this is to burn down the house to roast the pig.* • • •

We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction." (Emphasis added.)

It is submitted that the reasonable remedy for the evil of the practice of foreign law in New York by incompetent or unscrupulous foreign lawyers is not the unreasonable requirement that they forfeit their profession by becoming American citizens, and joining the New York Bar. The remedy is, rather, that proposed by the respondent itself, through its "Committee on the Unlawful Practice of the Law," in its report recommending proposed legislation, as follows:

"*Observations of the Committee on the Unlawful Practice of the Law, of the New York County Lawyers Association:*

"The Committee agrees with the conclusions of the draft:

"That a person qualified to practice law in any of its branches in any country or elsewhere in the United States or within its jurisdiction, should be licensed to advise within New York in respect to the

laws of such country or place, and to open an office in New York for such purpose. The Committee believes that the license should go further than to permit advising concerning the law, and should permit such an attorney to prepare legal documents which are to be operative exclusively within the foreign country or elsewhere in the United States or within its jurisdiction.

"No such license should be issued without a thorough examination of the moral qualifications of the applicant, and it should be conditioned upon the limitations above mentioned. * * * He should be amenable to the code of ethics applicable to New York attorneys and subject to summary discipline by our Courts." (Quoted in 1920 Report of N. Y. State Bar Ass'n, pp. 293-4.)

The license proposed above is a reasonable, constitutional method, whereas Section 270 of the Penal Law, construed as requiring American citizenship, knowledge of New York law and membership in the New York Bar, is, we submit, unreasonable and unconstitutional.

CONCLUSION

Appellant suggests that this appeal presents Federal questions so substantial as to deserve plenary consideration by, and oral argument before, the Supreme Court of the United States.

Respectfully submitted,

HOMER H. BRELAND,
Counsel for Appellant,
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Nyack, New York.

APPENDIX "A"

FROESSEL, J.—In this proceeding, brought under Subdivision of section 750 of the Judiciary Law, appellant has been adjudged in contempt (without further penalty) and enjoined, among other thing, "from practicing or assuming to practice law in any manner whatsoever, and from giving and furnishing any legal advice and opinions and rendering legal services of any kind, nature and description."

Appellant, a Mexican citizen and lawyer admitted to practice in the courts of that country, but never a citizen of the United States nor a member of the New York Bar, has maintained offices in the City of New York for a considerable period of time. He advertises in a daily newspaper as follows: "Mexican Lawyer in N. Y. Lorenzo Roel, Registered Consulate, 149 Bway. BA 7-4796."

At his offices appellant (1) advised members of the public on Mexican law, including Mexican divorce law; (2) acted as a consultant to members of the Bar on Mexican legal matters, and (3) testified as an expert witness on Mexican law in actions and proceedings in the courts of this state. The actions of appellant in the latter two respects are not involved in this proceeding, and thus we do not pass upon them here.

Appellant does not deny that he prepares, in the City of New York, legal papers and documents which are required for the institution of divorce actions in Mexico, forwards the same to a lawyer whom he retains in Mexico to represent the client, and that he takes all the steps necessary or required to aid and assist in the procurement of such divorce; that he gives legal advice and renders legal services, within the City and State of New York, upon other matters pertaining to the laws of the Republic of Mexico; prepares and draws legal documents, contracts, agreements and other papers applicable and pertaining to the laws of Mexico; that such services and advice

aforementioned are rendered by him within the City and State of New York and to residents and citizens of New York. Appellant also admits that he makes it a practice and a business to render legal services to citizens and residents of this state to effect a divorce upon grounds not recognized by the laws of this state, and by jurisdiction effected solely by consent of one or both of the parties involved; nor does he deny the fact that he fails to advise such persons of the legal consequences in this state of their acts, the effect thereof upon their estates, the right of such parties in respect of their children, if any, or that such proceedings are or may be contrary to the public policy of this state.

Appellant concededly does not give any advice as to New York law, and, in his contract of retainer form used for the past year in divorce actions, the client is requested to state that appellant "assume[s] no responsibility concerning the lack of validity or legal effect" of the divorce decree outside Mexico, and that the client has consulted an American lawyer of his own state. Previously appellant had included in these retainer agreements a statement that he advised the client to consult a competent local lawyer.

Petitioner asserts that appellant practices law in the State of New York without being licensed to do so, in violation of section 270 of the Penal Law, and that his newspaper advertisements violate section 1452 of the Penal Law. Its position is supported by amicus briefs filed by the New York State and Brooklyn Bar Associations, as well as by Unauthorized Practice News (Vol. XXII, No. 1, March, 1956, pp. 39-41), issued by the American Bar Associations committee on unauthorized practice of the law, and partially supported by the Association of the Bar of the City of New York, which has also filed an amicus brief in favor of modification of the order below.

Appendix "A".

Appellant asserts that the fact that his practice is restricted to Mexican law makes the provisions of section 270 inapplicable to him. He urges that (1) he does not practice "law" in New York, since he only gives advice and prepares instruments based on Mexican law, and Mexican law is not law in New York; (2) if he is deemed to practice "law," he practices only Mexican law and is not violating section 270 of the Penal Law, and (3) if he is subject to section 270 of the Penal Law, that statute is unconstitutional.

It seems perfectly clear that the activities engaged in by appellant constitute the practice of law (People v. Alfani, 227 N. Y., 334, 337-339; Matter of New York County Lawyers Ass'n, Bercu, 273 App. Div., 524, aff'd 299 N. Y., 728). The fact that Mexican law must be proven as "fact" in courts of our state is wholly irrelevant (see Civ. Prac. Act, sec. 344-a, Subdiv. B, particularly the last sentence). We are here examining the nature of the activities performed by appellant, not the sources of authority of the law which he practices. Whether a person gives advice as to New York law, federal law, the law of a sister state, or the law of a foreign country, he is giving legal advice. Likewise, when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law whether the documents be prepared in conformity with the laws of New York or any other law. To hold otherwise would be to state that a member of the New York Bar only practices law when he deals with local law, a manifestly anomalous statement.

This result accords with that reached in Matter of Pace (170 App. Div., 818), where attorneys assisting a Delaware corporation in filling out forms in connection with the incorporation of three companies under Delaware law were found guilty of aiding the corporation in its illegal practice of law (see also Matter of New York County

Lawyers Ass'n, Anonymous, 207 Misc., 698). It is not inconsistent with our decision in Bennett v. Goldsmith (280 N. Y. 529), in which we held, under the Special Term findings, that a person holding himself out as capable of assisting immigrants in gaining legal entry was neither representing himself as being able to perform legal services nor actually performing them.

The question here presented is whether appellant, because he is practicing exclusively foreign law, is violating section 270 of the Penal Law by practicing law in this state without being licensed to do so. Section 270, so far as pertinent, provides: "It shall be unlawful for any natural person to practice * * * as an attorney-at-law * * * or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, * * * or advertise the title of lawyer * * * in such manner as to convey the impression that he * * * conducts or maintains a law office * * * without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath."

Appellant urges that the term "law" as used in this section refers to New York law alone. The cases cited in support of this contention are in nowise apt. In dealing with the question as to what constitutes the unauthorized practice of law, we have not limited the practice of law to New York law. Thus, persons or corporations engaging in the practice of federal law have been found violating the statute (Matter of New York County Lawyers Ass'n, Bercu, supra—accountant giving federal tax advice; Matter of New York County Lawyers Ass'n, Cool, 294 N. Y., 853—labor relations institute giving labor law advice; People v. Lawyers Title Corp'n, 282 N. Y., 513, 519-520—corporation preparing legal documents for use under National Housing Act; to the same effect, Petition of Kearney, 63 So., 2d, 630, Fla.—member of Bar not admitted in Florida not allowed to practice as federal

tax counsel; Gardner v. Conway, 234 Minn., 468—accountant and federal tax law; Chicago Bar Ass'n v. Kellogg, 338 Ill. App., 618, and Marshall v. New Inventors' Club, 69 Ohio L. Abs., 578, 117 N. E., 2d, 737, Ohio Common Pleas—patent consultant not a member of the Bar). The decisions of our lower courts involving the laws of sister states (Matter of Pace, supra) and foreign countries (Matter of New York County Lawyers Ass'n, Anonymous, supra) have reached the same conclusion.

Appellant argues here that the Association of the Bar and the New York County Lawyers Association have both held the course of conduct he engages in ethical, and therefore implied that it was legal. However, the opinions of the committee on professional ethics of these groups have frequently called the attention of the foreign lawyer to section 270 of the Penal Law and its possible application to his activities (Opinions of Committees on Professional Ethics, Columbia Univ. Press, 1956, pp. 12, 15, 28, 41, 59, 428, 745). The Association recommended, in 1924 and 1925, that legislation be passed to change the state of the existing law and allow foreign lawyers to be licensed to practice in the limited area of their specialty, but no legislation was adopted. In 1947 the Association's committee again recommended legislation on the subject (Record of Association of the Bar, vol. 2, p. 136). In the meanwhile other amendments had been made to section 270 in 1939, not affecting this question. Recently, in 1955, bills were introduced in both the Assembly and the Senate in the respect advocated by the Association of the Bar in 1924, but the bills were not reported out of committee (see 1 N. Y. Law Forum, 376, 377).

In the present case we are dealing with the conduct of a person who renders legal services to the public as a business. While it is true that he renders only specialized services dealing with a field in which he claims to be peculiarly competent, the competence of appellant in the practice of his specialty is not dispositive of the case

before us. In many fields of endeavor laymen acquire specialized knowledge which is relevant to the practice of law in that area. Thus accountants may know a great deal about tax law and labor relations consultants much about labor law. A specialized area of competence does not, however, entitle these laymen to engage in the business of giving legal advice based on their knowledge of the subjects. A foreign lawyer who is familiar with the law of the country in which he is a lawyer is in a similar position. He is a specialist in a particular field of law, but is nevertheless a layman in this state when he is not a member of the Bar here.

It should be noted that if we were to reverse here and find that appellant was not violating section 270 of the Penal Law, it would not matter whether or not appellant was admitted as a lawyer in the foreign jurisdiction, nor whether he was competent to advise as to that law. Protection of the members of the lay public of our state, when they seek *legal advice*—and that is what defendant purported to furnish—is the basis of the requirements of licensing of attorneys by the state, and this protection must be deemed to embrace whatever kind of law or legal rights the layman seeks advice on (see Matter of New York County Lawyers Ass'n Standard Tax & Management Corp'n, 181 Misc., 632.) To allow a Mexican lawyer to arrange the institution of divorce proceedings for a New York resident in a Mexican court, without allowing him to tell the client that the divorce might be invalid (Querze v. Querze, 290 N. Y., 13), or that it might adversely affect estate or other property rights or status in this state (Matter of Rathscheck, 300 N. Y. 346), is to give utterly inadequate protection to him. (see 70 Harv. L. Rev., 1112-1113). Nor are we in anywise persuaded by the argument in the brief of the Association of the Bar that there is any difference between the right of a Mexican lawyer to act and advise the public in divorce

matters and the right of foreign lawyers generally to act and advise with respect to foreign law.

When counsel who are admitted to the Bar of this state are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign state (Degen v. Steinbrink, 202 App. Div., 477, aff'd 236 N. Y., 669). Moreover, the conduct of attorneys admitted here may be regulated by our courts (Matter of Gomez-Franco, 274 App. Div., 56; Matter of Anonymous, 274 App. Div., 89; see Caldwell v. Caldwell, 298 N. Y., 146, 147), and dealt with when they engage in unethical practices; they may not plead in defense that since the matter involved related to the law in New Jersey or Connecticut or anywhere outside of our jurisdiction, they were not practicing law and were therefore immune from disciplinary action. A foreign law specialist, on the other hand, is not subject to discipline; he need not be a lawyer of any jurisdiction; he may be without good character; and his activities may not even be regulated under the present state of the law.

The complex problem posed by the activities of foreign attorneys here is a long-standing one. It may well be that foreign attorneys should be licensed to deal with clients in matters exclusively concerning foreign law, but that is solely within the province of the Legislature. Our courts are given much control over the lawyers admitted to the Bar of our state; we have no control, however, over those professing to be foreign law experts.

We see no substance in appellant's claim that section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law, in that the statute as so construed is unreasonable and serves no public purpose. Only recently the Supreme Court of the United States said: "A State can require high standards of qualification, such as good moral character or

proficiency in its law, before it admits an applicant to the bar," so long as such qualification has a rational connection with the applicant's fitness or competency to practice law (Schware v. Board of Bar Examiners, 353 U. S. 232, 239). The requirements that the Legislature has established as a prerequisite for admission to the Bar were enacted for the protection of the public (People v. Alfani, 227 N. Y., 334, 339, supra). As heretofore pointed out, the public is as liable to injury when an unlicensed person gives advice to an individual as to his legal rights under foreign law as it is with respect to his rights under domestic law. The state need not have separate examinations for those who will specialize in real estate law, patent law, mining law, foreign law, or any other law. There are many branches of the law that a Bar examination does not reach, but the test is a general one which all qualified applicants are required to take. And so all are equally subject to the same character qualifications. Thus it is not unreasonable to require that a person desiring to engage in the practice of foreign law be admitted to the Bar here and be subject to the same rules as every other member of the Bar of this state.

Accordingly, the appeal taken as of right should be dismissed on the ground that no substantial constitutional question is involved; as to the appeal taken pursuant to leave, the order appealed from should be affirmed.

Van Voorhis, J. (dissenting).—The injunctive relief against respondent-appellant is too broad, in my opinion, under the order appealed from. It may well be that his activities with respect to Mexican divorces did constitute unlawful practice in New York State in violation of section 270 of the Penal Law, for the reason that the advice given or the services rendered by him had a relation to questions of status, property or other rights or obligations in New York. Nevertheless, the injunction goes so

far as to restrain him from holding himself out as a Mexican attorney, or from giving any advice with respect to foreign law or the rendering of any legal services here which pertain exclusively to a foreign jurisdiction.

This is more than the opinion of the Appellate Division purports to sanction, although it affirmed without modifying the injunction granted by Special Term. Sections 270 and 271 of the Penal Law forbid, in my opinion, the practice of law in the courts of this state or by advising with respect to law binding in this state, but do not forbid advising in reference to the laws of other countries or the preparation of papers for use in the courts of other countries where questions of status, property or other rights or obligations in New York are not affected. "To hold that the word *law* or *laws*, as used in our statute books, includes any other laws than such as are of force in this state, would lead to endless confusion" (People v. Sturdevant, 23 Wend, 418, 421).

Not only does the context indicate that sections 270 and 271 of the Penal Law relate to laws in force in this state, but it is also noteworthy that neither of these sections mentions advice regarding laws of other nations. It is evident that the Legislature was aware of the difference between the practice of domestic law and of foreign law, and had no difficulty in employing language relating to the practice of foreign law when that subject was intended to be covered. Thus section 1452 of the Penal Law provides: "Whoever prints, publishes, distributes or circulates * * * notices of any kind offering to advise on laws of any foreign state, nation or jurisdiction for the express purpose of procuring or aiding in procuring any divorce, severance, dissolution, or annulment of any marriage * * * is guilty of a misdemeanor."

Possible situations having no impact on New York State in which appellant is restrained from giving advice have been cited to our attention, such as advising a resident of Mexico, temporarily in New York, with reference to

a business transaction or litigation pending in Mexico, or with reference to the preparation of a Mexican will; advising a Mexican national residing in New York with reference to the procedure to obtain restitution of property in Mexico seized by the Mexican Government; advising a resident of New York with reference to the preparation and execution of a power of attorney in Spanish valid under Mexican law to effect the sale of real estate valid in Mexico; or to a resident in New York in reference to precedure to be followed in Mexico to establish rights of inheritance under Mexican law. In none of such situations would the advice given or services rendered constitute practice of law within the meaning of sections 270 and 271 of the Penal Law.

The serious consequences of the full reach of this injunction should not be obscured by the ill repute of Mexican divorces. Our eyes should be open to the circumstance cited by the Association of the Bar of the City of New York in support of modifications, that the principle underlying this injunction also prevents the giving of legal advice in this state on other subjects than divorce by lawyers of other countries regarding business, financial or personal transactions anywhere in the world.

We are told and have no reason to doubt that many law firms in New York have offices in other cities, such as Washington, Boston, London, and Paris, and that many have foreign associates who are not licensed to practice in New York. The ethical propriety of such arrangements has always been recognized, provided that it is made clear in each jurisdiction that unlicensed foreign associates are not admitted to practice in that jurisdiction. The performance of such services by American lawyers in Great Britain, France or Germany, for example, would be precluded by the aplication in those jurisdictions of the doctrine now announced by the majority of the court.

When the Legislature enacted section 270 of the Penal Law, it was charged with knowledge of these prevailing

customs and practices in this state and did not prohibit them (People v. Title Guar. & Trust Co., 227 N. Y., 366, 375).

In this century when the United States has become the creditor nation of the world and when the ramifications of our industrial, commercial, financial and recreational lives extend to every corner of the globe, it is especially improbable that the Legislature intended to preclude the giving of legal advice in this state to our citizens concerning these far-flung enterprises by trained lawyers from abroad who are equipped to give accurate information and opinions regarding them. The customary residential requirements for admission to the Bar would in themselves often preclude their becoming admitted to our Bar.

It is said that such practitioners may give advice here regarding foreign law provided that they are employed to do so in conjunction with some lawyer who is admitted to practice in this state, but that would be inconsistent with the principle underlying the order appealed from. It would be quite as much practicing law to advise a New York State lawyer as it would be to advise a layman, at least, unless the New York lawyer assumed responsibility for the correctness of the advice and did not act as a conduit to transmit the foreign lawyer's advice to the client. In the latter event, the New York lawyer would be merely a "stand in," and, if the theory of petitioner be sound, would be unethically splitting fees with persons engaging in illegal practice of the law. All that would be accomplisred by that would be to obtain remuneration for a New York lawyer for the rendition of no service which he is qualified to perform, which would tend to justify the charge that the motive of such restrictions is "feather bedding" rather than the protection or advantage of the public. The foreign lawyer would still be practicing law in this state under peti-

tioner's theory, it seems to me, unless the New York State lawyer educated himself in the laws and customs of the countries in the world where his client is concerned, so as to be able to evaluate and indorse the views of the foreign lawyers on his own knowledge and responsibility. In that event, of course, the services of the foreign lawyer would be unnecessary. This sweeping injunction would preclude the practicing of law by foreign lawyers here in counseling New York lawyers, with whom they would divide fees paid for advice given exclusively in regard to foreign law or for services in courts of foreign countries.

The omission of the Legislature to enact statutes licensing or regulating the conduct of foreign lawyers in practicing purely foreign law in this state, does not indicate that such conduct is prohibited by sections 270 and 271 of the Penal Law, but merely that the Legislature has not seen fit to subject them to regulation. Whatever the merits of such proposed legislation, it is not for us to enact it. If foreign lawyers came under sections 270 and 271 of the Penal Law, it would stifle their activities to the detriment of the large and increasing number of our nationals who engage in transactions in foreign countries, inasmuch as it would be impossible for most of them to be admitted to practice in this state.

The order appealed from should be modified by limiting the injunction to the facts of this case, i.e., the performance by appellant of legal services for New York residents in connection with Mexican law in so far as such services involve advice with respect to the application of such law to legal status or other rights or obligations under the law of New York, and, as so modified, should be affirmed.

Conway, Ch. J., Desmond, Dye and Burke, JJ., concur with Froessel, J.; Van Voorhis, J., dissents in an opinion in which Fuld, J., concurs.

Order affirmed.

APPENDIX "B"

Order Appealed From

No. 145

In the Matter of the Application of New York County Lawyers' Association, Respondent, to Punish for Contempt and to Enjoin the Unlawful Practice of the Law by Lorenzo J. Roel,

Appellant.

Be it Remembered, That on the 14th day of May in the year of our Lord one thousand nine hundred and fifty-seven Lorenzo J. Roel, the appellant in this cause, came here unto the Court of Appeals, by Homer H. Breland, his attorney, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And New York County Lawyers' Association, the respondent in said cause, afterwards appeared in said Court of Appeals by Abraham N. Davis, its attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Homer H. Breland, of counsel for the appellant, and by Mr. Abraham N. Davis, of counsel for the respondent, briefs filed by *amici curiae*, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And thereupon, as well the Notices of Appeal and return thereto aforesaid as the Judgment of the Court of Appeals, aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
the State of New York.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 21 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 627

In the matter of the application of New York County Lawyers Association to punish for contempt and to enjoin the unlawful practice of the law by Lorenzo J. Roel.

LORENZO J. ROEL,

Appellant,

v.

NEW YORK COUNTY LAWYERS ASSOCIATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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INDEX

PAGE

I—Appellee's argument that since the statute in question excludes appellant from his occupation because he is not a member of the New York Bar, it does not exclude him from such occupation because he is an alien is without merit ... 1

II—Appellee's argument that foreign lawyers may reasonably be excluded from the occupation of giving advice on foreign law because, in giving such advice, they might be guided by their "foreign allegiance" is also without merit 3

III—Appellee's argument that since the practice of foreign law and the practice of domestic law are both the "practice of law", whatever requirements are reasonable for one are equally reasonable for the other is unsound 5

A. The public is not protected against incorrect advice on foreign law by the requirement that persons giving such advice be members of the New York Bar 6

B. Since protection of the public admittedly does not require that a New York lawyer know foreign law and be able to relate his advice to foreign law, neither does the protection of the public require that a foreign lawyer know New York law and be able to relate his advice to New York law 8

PAGE

IV—Since the New York Court of Appeals expressly decided the federal question that the Statute, as construed by it, does not violate the due process clause and since the order appealed from must be reversed if this Court holds to the contrary, appellee's contention that the decision "rests on an adequate non-federal basis" is erroneous 9

V—Appellant's practice in proceeding by appeal under Title 28 U.S.C. Sec. 1257 (2) is correct .. 10

Conclusion 12

TABLE OF CASES

Asakura v. Seattle, 265 U. S. 332 2

Flournoy v. Wiener, 321 U. S. 253 10

Herb v. Pitcairn, 324 U. S. 117 9

Standard Oil Co. v. Johnson, 316 U. S. 481 11

Takahashi v. Fish & Game Comm., 334 U. S. 410 2

Toomer v. Witsell, 334 U. S. 385 4

STATUTE

Title 28, U.S.C. Sec. 1257 (2) 10

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NEW YORK COUNTY LAWYERS ASSOCIATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

1

Appellee's argument that since the statute in question excludes appellant from his occupation because he is not a member of the New York Bar, it does not exclude him from such occupation because he is an alien is without merit.

Appellee expressly states (p. 9):

> "In no State of the United States may an alien practice law and the states are uniform in their denial of admission of aliens to the Bar."

Since, then, appellant is excluded from the New York Bar because he is an alien, and is excluded from his occupation because he is not a member of the New York Bar, it necessarily follows that he is excluded from his occupation because he is an alien. Obviously, the law that aliens cannot be excluded from occupations merely because of their alienage cannot be evaded by requiring a license to engage in such occupations and limiting the issuance of such license to citizens. On appellee's theory, a statute requiring a license to engage in the occupation of commercial fishing and limiting such license to American citizens is constitutional since it excludes aliens because they have no license and not because they are aliens. This Court, however expressly held to the contrary in *Takahashi* v. *Fish & Game Comm.*, 334 U. S. 410 (p. 13 of "Jurisdictional Statement").

Similarly, in *Asakura* v. *Seattle*, 265 U. S. 332, this Court struck down a statute requiring that pawnbrokers be licensed but limiting the issuance of such license to American citizens. This Court expressly held that the statute was unconstitutional because "it makes it impossible for aliens to carry on the business" (pp. 341-2). On appellee's theory, this statute, denounced by this Court as unlawfully excluding Japanese from the occupation of pawnbroker, was perfectly proper since it excluded them not because they were Japanese but because they didn't have a license, even though such license could not be obtained by Japanese.

What has been said above applies equally to appellee's contention that appellant is not excluded from his occupation because he does not know New York law but because he is not a member of the New York Bar. Since, obviously, he cannot be a member of the New York Bar without knowing New York law, the requirement that he be a member of the New York Bar as a condition to engaging in his occupation of giving advice on foreign law

excludes him from such occupation because he does not know New York law and is qualified to advise only on Mexican law (fols. 129, 135, 171, 176).

II

Appellee's argument that foreign lawyers may reasonably be excluded from the occupation of giving advice on foreign law because, in giving such advice, they might be guided by their "foreign allegiance" is also without merit.

Appellee does not question the rule of law relied on by appellant that aliens cannot constitutionally be excluded from any occupation unless they are, as a class, "the peculiar source of the evil" at which the statute excluding them is aimed. Appellee attempts to put alien lawyers in such a class by the following argument (pp. 9-10):

> "The foreign lawyer owes his allegiance to a foreign power. If he were permitted to give advice as to foreign law, there is the danger that he would be guided by his foreign allegiance rather than his duty to his New York client."

Not only is there nothing in the Record to support this argument of appellee's but this Court will take judicial notice that the "foreign allegiance" of alien lawyers cannot, in any way, motivate them to give erroneous or dishonest advice to Americans on foreign law. For instance, what conceivable reason is there for saying that appellant, a Mexican citizen and member of the Mexican Bar, is likely to give incorrect advice on Mexican law to his New York clients because he is a Mexican citizen and "owes his allegiance to a foreign power"? What conceivable benefit can Mexico derive from her lawyers' misleading Americans as to what Mexican law is?

It is, we submit, a wholly gratuitous reflection upon foreign nations to say that their lawyers are under a duty, as citizens of their respective foreign countries, to mislead Americans as to what the law of such foreign countries is. Obviously, a Mexican lawyer residing in New York is no more likely to mislead Americans as to to Mexican law because of his "foreign allegiance" than a Mexican lawyer in Mexico. Does appellee contend that an American citizen who consults a Mexican lawyer in Mexico City is in danger of getting incorrect or dishonest advice as to Mexican law because this lawyer "owes his allegiance to a foreign power"? Appellee's argument that the only place in the world where Americans can get sound advice on foreign law is in America and only by consulting American lawyers there, is, we respectfully submit, absurd.

This Court said, in *Toomer* v. *Witsell*, 334 U. S. 385, in holding unconstitutional a South Carolina Statute requiring non-residents to pay a fishing license fee one hundred times as great as residents (pp. 398-9):

> "Nothing in the Record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater. * * * But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose. * * * *We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them.*" (Emphasis supplied)

The application of the above case to the case at bar is clear. Just as, in the cited case, a State could not discriminate against non-citizens where there was no "reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them" which, in effect, excluded them from the occupation of fishing in the State, so, in the case at bar, a State cannot exclude alien lawyers from the occupation of giving advice on foreign law where there is no "reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them," entirely excluding them from such occupation.

Similarly, as in the cited case, "the State is not without power", in the case at bar, to impose reasonable regulations on alien lawyers, requiring them to be qualified in their foreign law and possess good character, as expressly recommended by appellee's own Committee (pp. 25-6 of appellant's "Jurisdictional Statement"). But, as in the cited case, "we would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced against them", in excluding lawyers from the occupation of giving advice on foreign law because of the danger that they would be guided by their "foreign allegiance" rather than by their duty to their New York clients.

III

Appellee's argument that since the practice of foreign law and the practice of domestic law are both the "practice of law", whatever requirements are reasonable for one are equally reasonable for the other is unsound.

Appellee's whole case really reduces itself to this: Foreign law and domestic law are both "law" and the

practice of foreign law and the practice of domestic law are both the "practice of law". Hence, whatever requirements are reasonable for engaging in one are equally reasonable for engaging in the other. Since it is reasonable to require that persons practicing domestic law be American citizens, have knowledge of domestic law and be members of the State Bar, it is equally reasonable to impose the same requirements on persons practicing foreign law. So the argument of appellee runs. This argument is, we submit, unsound.

The fact that foreign law and domestic law are the same in that both are "law" does not mean that they are the same in all respects or that there are no differences between them which require different treatment for any purpose. For instance, knowledge of domestic law is essential to the practice of domestic law; but is it not absurd to say that knowledge of domestic law is essential to the practice of foreign law merely because both are equally "law" and that what is required for the practice of one must be required for the practice of the other?

Similarly, as to the requirement of American citizenship, such requirement is reasonable for those practicing domestic law (who are officers of the Court) but unnecessary and unreasonable for those practicing foreign law who cannot appear in court and need not be officers thereof. Hence, the mere fact that those who practice foreign law and those who practice domestic law are both "practicing law" is no reason for requiring American citizenship of both, thereby entirely excluding foreign lawyers from giving advice on their own foreign law.

A. The public is not protected against incorrect advice on foreign law by the requirement that persons giving such advice be members of the New York Bar.

Appellee's argument that "the protection of the public when they seek legal advice" requires that advisers on

foreign law be members of the New York Bar overlooks the fact that knowledge of foreign law is not required for membership in the New York Bar and that such members are wholly ignorant of foreign law. How, then, is the public protected by a statute forbidding foreign lawyers who know foreign law to advise the public on such law and permitting only New York lawyers wholly ignorant of foreign law to give advice on such law? Indeed, New York lawyers, although wholly ignorant of foreign law, cannot consult foreign lawyers in New York who know such law since advising lawyers is "practicing law" the same as advising laymen (as the dissenting opinion below points out, 3 N. Y. 2d at p. 235); and the statute in question, construed as forbidding foreign lawyers to advise laymen on foreign law, thus forbids them to advise New York lawyers on foreign law, since it forbids them "to practice law as aforesaid or in any other manner."

Where, then, is the protection to the public in this statute, as construed, which prevents the public from consulting foreign lawyers who know foreign law and forces them to consult New York lawyers who not only know nothing of foreign law but cannot consult those who do?

Obviously, the only way to protect the public against incorrect advice on foreign law is by legislation requiring that persons practicing foreign law be qualified in such foreign law and possess good moral character. Such legislation has been proposed by appellee's own Committee on the Unlawful Practice of Law (quoted in appellant's Jurisdictional Statement, pp. 25-6). The fact that such legislation has not been enacted and that until it has been enacted, the public may be inadequately protected against ignorant or unscrupulous advisers on foreign law does not make it reasonable for the statute in question to entirely exclude foreign lawyers from their occupation by requiring them to be members of the New York Bar which they cannot join because they are aliens.

B. Since protection of the public admittedly does not require that a New York lawyer know foreign law and be able to relate his advice to foreign law, neither does the protection of the public require that a foreign lawyer know New York law and be able to relate his advice to New York law.

Appellee argues that a foreign lawyer who knows no domestic law should not be allowed to advise New York residents on foreign law, since "he is unable to relate his advice to domestic law and thus is unable to consider all the elements of the problem presented to him for advice" (p. 13). This reasoning is obviously unsound since, by precisely the same logic, a New York lawyer who knows no foreign law should not be allowed to advise New York residents on domestic law, since "he is unable to relate his advice to" foreign law and "thus is unable to consider all the elements of the problem presented to him for advice". In other words, appellee's reasoning that foreign lawyers should be put out of business because they do not know New York law would likewise put New York lawyers out of business because they do not know foreign law! Indeed, appellee argues that there are no "areas of foreign law which do not relate to domestic law or to the status of a member of the public in New York" (p. 13). But if, as appellee contends, foreign law and domestic law are so interrelated that no one should advise on the former without knowing the latter, then it follows that no one should advise on the latter without knowing the former. That is to say, no one should be allowed to advise on the law of any state or nation who does not know the laws of all states and nations. Appellee's argument leads to absurd results and must be rejected.

IV

Since the New York Court of Appeals expressly decided the federal question that the Statute, as construed by it, does not violate the due process clause and since the order appealed from must be reversed if this Court holds to the contrary, appellee's contention, that the decision "rests on an adequate non-federal basis" is erroneous.

We submit that appellee wholly misconceives the doctrine that this Court will not review the decision of a State court which rests on an adequate non-federal basis. That doctrine is that where the decision of the State court may be supported on other and independent grounds, regardless of whether its decision of the federal question was right or wrong, this Court will not review the decision. The case at bar is clearly no such case since the decision of the State court, in this case, cannot be supported on any grounds at all if its decision of the constitutional question was wrong. Obviously, if the statute in question is unconstitutional, as construed and applied to appellant, the decision of the New York Court of Appeals holding him in contempt for violating this statute cannot be supported on any ground, federal or non-federal, and therefore does not rest on an adequate non-federal basis. This is clear from considering the reason given by this Court for refusing to review decisions that rest on an independent, non-federal basis. This Court said in *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of State Courts that rest on adequate and independent State grounds. * * * If the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Similarly, this Court said in *Flournoy* v. *Wiener*, 321 U. S. 253, 261-2:

> "Any determination which we might make of the Fifth Amendment question would thus leave unaffected the State Court's judgment brought here for review. * * * In such a case this Court has said that it will not enter 'a useless and profitless reversal where the same judgment will be rendered by the Court below after they have corrected the error in the federal question.'"

It is, then, submitted that the doctrine of the above cases has no application to the case at bar in which "the error in the federal question", if this Court finds such error, requires reversal of the State Court decision.

V

Appellant's practice in proceeding by appeal under Title 28 U.S.C. Sec. 1257 (2) is correct.

The Statute referred to is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

On this appeal, appellant has "drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution." As said by the New York Court of Appeals, in its opinion below, "he [ap-

pellant] urges that * * * if he is subject to Section 270 of the Penal Law, that statute is unconstitutional" and the Court further refers to "appellant's claim that Section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law." The decision of the New York Court of Appeals was "in favor of the validity" of the Statute, since it held that the appeal should be dismissed "on the ground that no substantial constitutional question is involved" and that "we see no substance in appellant's claim that Section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law." This appeal thus comes squarely within the Statute above quoted. In *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, a case very similar to the case at bar, this Court held that the proper remedy was an appeal under Sec. 237 (a) of the Judicial Code, containing the same provisions as are now in Tit. 28 U.S.C. Sec. 1257 (2). This Court said (pp. 482-3):

> "The California Motor Vehicle Fuel License Tax Act imposes a license tax, measured by gallonage, on the privilege of distributing any motor vehicle fluid. Section 10 states that the Act is inapplicable to any motor vehicle fuel sold to the Government of the United States or any department thereof for official use of said Government. The appellant, a distributor within the meaning of the Act, sold gasoline to the United States Army Post Exchanges in California. The State levied a tax, and the appellant paid it under protest. The appellant then filed this suit in the Superior Court of Sacramento County seeking to recover the payments upon two grounds: (1) that sales to the Exchange were exempt from tax under Section 10; (2) *that if construed and applied to require payment of the tax on such sales, the Act would impose a burden upon instrumentalities or agencies of the United States contrary to the Fed-*

eral Constitution. Holding against the appellant on both grounds, the trial court rendered judgment for the State. The Supreme Court of California affirmed, 19 Cal. 2nd 104; 119 poc. 2nd 329. *Since validity of the state statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Sec. 237 (a) of the Judicial Code."* [Now Tit. 28 U.S.C.A. Sec. 1257 (2).]

That the appeal, in the case at bar, was properly taken, and falls within the doctrine of the case quoted above is clear from appellee's own statement of the nature of appellant's claim, as follows (p. 19):

> "His claim was that if the Court construed said section to include the practice of foreign law, and applied such construction to him, he would be deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States."

CONCLUSION

Appellee's motion to dismiss this appeal should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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LORENZO J. ROEL,

Appellant,

NEW YORK COUNTY LAWYERS ASSOCIATION,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS AND BRIEF FOR APPELLEE.

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INDEX.

	PAGE
Statement	1
Nature of Proceeding and Decree	2
Constitutional Issue Presented	3
Statement of the Case	3
Summary of Appellee's Argument	6
POINT I.—No substantial Federal question is presented	7
POINT II.—The decision of the New York Court of Appeals rests on an adequate non-Federal basis and should not be reviewed	16
POINT III.—This appeal was improperly taken under Title 28, U. S. C. Sec. 1257 (2), and should be dismissed	19
CONCLUSION	20

Table of Cases.

	PAGE
Aero Transit Co. v. *Commissioners*, 332 U. S. 495	7
App. of Cassidy, 268 App. Div. 282, affd. 296 N. Y. 926	11, 18
Barsky v. *Regents*, 347 U. S. 442	7
Bartemeyer v. *Iowa*, 18 Wall (U. S.) 129	8
Black v. *Cutter Laboratories*, 351 U. S. 292	18
Bob-lo Excursion Co. v. *Michigan*, 333 U. S. 28	7
Bradwell v. *Illinois*, 16 Wall (U. S.) 130	9
Caldwell v. *Caldwell*, 298 N. Y. 146	5
Charleston Federal Savings & Loan Assn. v. *Alderson*, 324 U. S. 182	19
Degan v. *Steinbrink*, 202 App. Div. 477, aff'd 236 N. Y. 669	4
Ex parte Thompson, 10 N. C. (Hawks) 355	9
Holly v. *Lawrence*, 317 U. S. 518	18
In re Admission to the Bar, 61 Neb. 58, 84 N. W. 611	9
In re Ashford, 4 Hawaii 614	9
In re Hong Yen Chang, 84 Cal. 163, 24 P. 156	9
In re Lockwood, 154 U. S. 116	9
In re Maggio, 27 A. D. 129, 51 N. Y. Supp. 1055	9
In re Summers, 325 U. S. 561	9, 10
In re Yamashita, 30 Wash. 234, 70 Pac. 482	9
Jett Bros. Distilling Co. v. *Carrollton*, 252 U. S. L.	19
Karlin v. *Culkin*, 248 N. Y. 465, 470	10
Koenigsberg v. *State Bar of California*, 353 U. S. 252	9
Large v. *State Bar of Cal.*, 218, 334, 23 P. (2) 288	9
Matter of Anonymous, 274 App. Div. 89	5
Matter of Gomez-Franco, 274 App. Div. 56	5
Matter of N. Y. County Lawyers Assn. (Bercu), 273 App. Div. 524, affd. 299 N. Y. 728	7, 12, 16, 17
Matter of N. Y. County Lawyers Assn. (Anon.), 207 Misc. 698	7, 16
Matter of O'Neill, 90 N. Y. 584	9

PAGE

Matter of Pace, 170 App. Div. 818 ..... 7, 16
Matter of Peters, 221 App. Div. 607, aff'd 250 N. Y. 595 17-18
Matter of Rothscheck, 300 N. Y. 346 4
Mergenthaler Linotype Co. v. *Davis*, 251 U. S. 256 19
People v. *Alfani*, 227 N. Y. 334 ..... 5, 7, 16, 17
Querze v. *Querze*, 290 N. Y. 13 4
Schware v. *Board of Bar Examiners*, 353 U. S. 232 ..... 8, 9
State v. *Rossborough*, 152 La. 946, 94 So. 858 9
Williams v. *Kaiser*, 323 U. S. 471, 477 18

STATUTES.

Fourteenth Amendment of the Constitution of the United States 19
Judiciary Law of New York, Sec. 466 ..... 10, 17
New York Penal Law, Sec. 270 ..... 3, 4, 5, 6, 7, 10, 11, 12, 15, 16, 17, 19
Title 28, U. S. C., Sec. 1257(2) 1, 2, 6, 19
Title 28, U. S. C., Sec. 1257(3) 6

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LORENZO J. ROEL,

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS AND BRIEF FOR APPELLEE.

Statement.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal of the appellant upon the following grounds: (1) that the appeal does not present a substantial federal question; (2) that the determination of the State Court of Appeals rests on an adequate non-federal basis; and (3) that appeal to this Court does not lie under 28 U. S. C. Sec. 1257 (2).

This appeal is taken pursuant to Title 28 U. S. C. Sec. 2157 (2). The notice of Appeal was filed August 12, 1957 (Jurisdictional Statement, pp. 2, 3). Review is sought of an order of the Court of Appeals of the State of New York, dated July 3, 1957 (App. B, Jurisdictional Statement), affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, made March 26, 1957, (R., pp. 95-96), which, in turn, unanimously affirmed the order made by the Special Term of the Supreme Court of the State of New York, County of New York, on November 5, 1956, adjudging appellant in contempt, pursuant to Section 750B of the Judiciary Law of New York, for unlawfully practicing law in the State of New York, and enjoining him from continuing to practice law in that State (R., pp. 3-7).

The Jurisdictional Statement was served on November 26, 1957.

Nature of Proceeding and Decree.

The proceeding was instituted at the Special Term of the New York Supreme Court (Jurisdictional Statement, p. 2).

The application was granted, and an order was entered on November 5, 1956 which adjudged appellant in contempt (R., pp. 5-6), and enjoined him from continuing his practice of law (R., pp. 6-7) excepting from its provisions any legal opinions, advice and services rendered to a member of the New York bar (R., p. 7, f. 19). The opinion of the Court is reported in 4 Misc. (2) 728, 156 N. Y. Supp. (2) 651.

This order was affirmed by the Appellate Division of the Supreme Court of New York (3 App. Div. (2) 742, 160 N. Y. S. (2) 982), and by the Court of Appeals of the State of New York (3 N. Y. (2) 224, 165 N. Y. Supp. (2) 31; App. A, Jurisdictional Statement).

Constitutional Issue Presented.

The point of appellant's attack on the constitutionality of Section 270 of the New York Penal Law is that a license to practice law in New York requires (1) American citizenship, and (2) knowledge of New York law, and hence the construction placed upon Section 270 of the Penal Law excludes appellant from the practice of foreign law because he is an alien and does not know New York law (Jurisdictional Statement, p. 5).

From this it will be seen no substantial federal constitutional question arises, because it has been frequently held (and is admitted in appellant's statement) that a license to practice law may be restricted to citizens of good character who pass appropriate examinations.

The actual argument of appellant must be that he should be allowed to practice law, though unlicensed. He is clearly wrong.

Statement of the Case.

The basic facts, on which the decision below was rendered, are undisputed. A summary thereof appears in the opinion of the Court of Appeals (App. A, Jurisdictional Statement, pp. 27-28), which differs slightly from the conclusory statements of appellant (Jurisdictional Statement, pp. 5, 6). For the purpose of this motion, the salient facts are that appellant, a Mexican lawyer, and neither a citizen nor lawyer of New York, was engaged in the business of giving legal advice and rendering legal services, in respect of Mexican law, directly to the lay public of New York.

Appellant does not appear anywhere in his Jurisdictional Statement to challenge the proposition that his

activities constitute the practice of law in New York as held by the Court of Appeals (Jurisdictional Statement, App. A, p. 29).

The Court of Appeals holds that:

(1) The practice of foreign law is the practice of law in New York under Section 270 of the Penal Law (Jurisdictional Statement, pp. 30, 31).

(2) Appellant's competence in the field of foreign law is immaterial; a specialized area of competence does not entitle a layman to engage in the business of giving legal advice based on his knowledge of the subject; a foreign lawyer is in a similar position; he is a specialist in a particular field of law, and a layman in New York (3 N. Y. (2) 224, 231; Jurisdictional Statement, pp. 31, 32).

(3) The basis of the requirements for licensing attorneys is the protection of the public when they seek legal advice; this protection must be deemed to embrace whatever kind of law or legal rights are involved when advice is sought. It is utterly inadequate protection to a New York resident to allow a Mexican lawyer to arrange the institution of divorce proceedings in a Mexican court, without allowing him to tell his client that the divorce might be invalid (*Querze* v. *Querze,* 290 N. Y. 13), or that it might adversely affect estate or other property rights or status in New York (*Matter of Rothscheck,* 300 N. Y. 346). Nor is there any difference between the right of a Mexican lawyer to act and advise the public in divorce matters and the right of foreign lawyers generally to act and advise with respect to foreign law. New York lawyers, retained in a matter involving foreign law, are responsible for the proper conduct of the matter, and may not claim that they are not required to know the law of a foreign state (*Degan* v. *Steinbrink,* 202 App. Div. 477, aff'd 236 N. Y. 669); they

may be regulated by the courts (*Matter of Gomez-Franco,* 274 App. Div. 56; *Matter of Anonymous,* 274 App. Div. 89; See *Caldwell* v. *Caldwell,* 298 N. Y. 146, 147), and dealt with when they engage in unethical practices, and they may not plead, in defense, that the matter related to foreign law and therefore they are immune from disciplinary action (3 N. Y. (2) 224, 231, 232; Jurisdictional Statement, pp. 32, 33). A foreign law specialist is not subject to discipline; he need not be a lawyer of any jurisdiction; he may be without character, and his activities may not be regulated (3 N. Y. (2) 224, 232; Jurisdictional Statement, p. 33).

(4) There is no substance to appellant's claim that the application to him of Section 270 of the Penal Law deprives him of liberty and property without due process of law. The requirements established for admission to the bar are enacted for the protection of the public (*People* v. *Alfani,* 227 N. Y. 334, 339). The public is as liable to injury when an unlicensed person gives advice as to legal rights under foreign law as it is when advice is given as to domestic law. Separate examinations for various specialties in the law are not required. It is not unreasonable, therefore, to require a person wishing to engage in the practice of foreign law to be admitted to the New York bar and be subject to the same rules as every other member of the bar (3 N. Y. (2) 224, 233, Jurisdictional Statement, pp. 33, 34).

(5) The appeal taken as of right was dismissed on the ground that no substantial constitutional question was involved; on the appeal taken by leave of the Court, the order was affirmed.

Summary of Appellee's Argument.

POINT I.

The argument is the same as that set forth in the opinion of the Court of Appeals. Appellant's activities constitute the practice of law. He is enjoined from continuing them, not because he is an alien or because he does not know New York law, but because he has not been duly admitted to the practice of law in New York.

POINT II.

The decision below rests on a sound non-federal basis. Appellant is engaged in the practice of law within the meaning and intent of Section 270 of the Penal Law. The requirements for admission to practice law are based upon the protection of the public. The public is entitled to the same protection when it seeks advice on foreign law as it gets when it seeks advice on domestic law. It is not protected when an advisor of foreign law is unable to relate the problem presented to the effect or status of the New York resident under local law. The practitioner of foreign law, on appellant's thesis, need not be a foreign lawyer, nor need he have any qualification of education, character or status. He is unregulated and uncontrolled. That is no protection to the public.

POINT III.

Appellant may not take an appeal under Title 28 U. S. C. Sec. 1257 (2). His remedy is by writ of certiorari under Title 28 U. S. C. Sec. 1257 (3), because his claim, if any, would rest upon an assertion of a right, privilege and immunity under the Constitution of the United States.

If the Court should consider the appeal as if it were an application for certiorari, it should be denied for the same reasons presented on this application to dismiss.

POINT I.

No substantial Federal question is presented.

A. The Court of Appeals of the State of New York has determined that the practice of foreign law is the practice of law in New York within the meaning and intent of Section 270 of the New York Penal Law (3 N. Y. (2) 224, 228-230). The Supreme Court will accept and be bound by such construction. (*Aero Transit Co.* v. *Commissioners*, 332 U. S. 495, 499; *Bob-lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 33; *Barsky* v. *Regents*, 347 U. S. 442, 448.) Appellant is not a duly licensed lawyer in New York and therefore he violates said section of the Penal Law by engaging in the practice of foreign law.

"It is perfectly clear", says the New York Court of Appeals (3 N. Y. (2) 224, 228) "that the activities engaged in by appellant constitute the practice of law (*People* v. *Alfani*, 227 N. Y. 334, 337, 339; *Matter of N. Y. County Lawyers Assn.* (Bercu), 273 App. Div. 524, affd. 299 N. Y. 728)." It cites with approval *Matter of Pace*, 170 App. Div. 818 and *Matter of N. Y. County Lawyers Assn.* (Anon.), 207 Misc. 698.

It is the law of New York (*New York County Lawyers Assn.* (Bercu), 273 App. Div. 524, 527, affd. 299 N. Y. 728) that:

> "To practice *law in any manner*, unless one be duly and regularly licensed and admitted to practice law, is a violation of Section 270 of the Penal Law • • •. People *v.* Alfani, 277 N. Y. 334". (Italics by Court).

B. A license may properly be required for the practice of law.

Schware v. *Board of Bar Examiners*, 353 U. S. 232, 239.

Appellant's assertion of his alleged right to engage in the practice of foreign law is an assertion of a right to engage in an unlawful occupation. It stands, as was said by Mr. Justice Bradley, in *Bartemeyer* v. *Iowa* (18 Wall (U. S.) 129, 137):

> "* * * upon the same platform as does a claim of right to disregard laws and to usurp public franchises."

C. The appellant may not question the requirements of New York for admission to the bar, because he has not applied for such admission.

D. (1) Appellant has not been excluded from the practice of foreign law because of alienage, but because it constitutes the practice of law, and he is not a lawyer admitted to practice in New York.

(2) In any event an alien may be excluded from the practice of law, and such exclusion does not violate the Fourteenth Amendment.

The principle of the decision of the New York Court of Appeals is that no person may practice law in New York unless he is duly admitted to the New York bar. It applies to all laymen without distinction between citizenship and alienage.

The opinion of the Court of Appeals notes that the Court is dealing with the "conduct of a person who renders legal services to the public as a business."

The effect of the decision is to bar every person, citizen and alien, from engaging in the practice of foreign law, if he is not a duly admitted attorney.

The principle expressed is not applied to appellant because he is an alien, but because he is not a member of the New York bar.

It is settled law that the State under its police power, controls and regulates the practice of law, and may create standards for admission to the bar.

Bradwell v. *Illinois*, 16 Wall (U. S.) 130, 139;
In re Lockwood, 154 U. S. 116, 118;
In re Summers, 325 U. S. 561;
Schware v. *Board of Bar Examiners*, 353 U. S. 232;
Koenigsberg v. *State Bar of California*, 353 U. S. 252.

In no State of the United States may an alien practice law, and the states are uniform in their denial of admission of aliens to the bar.

See:

Matter of O'Neill, 90 N. Y. 584;
Large v. *State Bar of Cal.*, 218, 334, 23 P. (2) 288;
In re Ashford, 4 Hawaii 614;
Ex parte Thompson, 10 N. C. (Hawks) 355;
In re Yamashita, 30 Wash. 234. 70 Pac. 482;
In re Admission to the Bar, 61 Neb. 58, 84 N. W. 611;
In re Maggio, 27 A. D. 129, 51 N. Y. Supp. 1055;
In re Hong Yen Chang, 84 Cal. 163, 24 P. 156;
State v. *Rossborough*, 152 La. 946, 94 So. 858.

The foreign lawyer owes his allegiance to a foreign power. If he were permitted to give advice as to foreign law, there is the danger that he would be guided by his

foreign allegiance rather than his duty to his New York client.

Rule I of the New York Rules of Civil Practice provides that no person shall be admitted to practice law unless he furnish satisfactory proof to the effect:

(1) That he believes in the form of government of the United States and is loyal to such government, and

(2) That he is a citizen of the United States.

Section 466 Judiciary Law of New York, and 270 of the Penal Law, require that before a person be admitted, he shall take the Constitutional Oath of Office. The Constitutional Oath requires allegiance to, and support of, the Constitution of the United States, and of the State (Art. 13 Sec. 1, New York State Constitution). An alien cannot take such an oath. This Court has sustained the right of a State to refuse admission to its bar any person who cannot, or will not take such an oath to support the State Constitution (In re Summers, 325 U. S. 561).

A lawyer becomes an "officer of the court and like the Court itself, an instrument or agency to advance the ends of justice" (People ex rel *Karlin* v. *Culkin*, 248 N. Y. 465, 470, 471).

It is, therefore, a proper and reasonable exercise of the police power of the State, for the protection of the New York public, to restrict admission to the bar and the right to practice law, including foreign law, to those only who owe allegiance to, and will support, the Constitution of the United States and of the State, and who believe in our form of government. These are essential attributes to "officers of the court" who are part of our administration of justice. An alien cannot qualify. He may be one who owes his allegiance and support to a foreign country whose policy it may be to overthrow our government by force and vio-

lence. New York will not admit to the bar a citizen who believes in the resort to force to overthrow the government (*App. of Cassidy,* 268 App. Div. 282, affd. 296 N. Y. 926).

Appellant concedes that citizenship is a proper requirement for admission to the bar (Jurisdictional Statement, pp. 11-16). Indeed he states that membership in the Mexican Bar is restricted to citizens, and if he were to become an American citizen he would cease to be a Mexican lawyer (Jurisdictional Statement, p. 6). The conclusion to be drawn is that if appellant lost his Mexican citizenship he would no longer be able to practice law in Mexico. Since the practice of foreign law is the practice of law in New York, and appellant is not a citizen of the United States, his exclusion in New York is on the same basis as would be his exclusion in Mexico, if he were not a Mexican citizen. It ill behooves him to ask for better consideration in New York than he would receive in his own country.

Section 270 of the Penal Law is aimed at the evil of the practice of law by laymen, whether they are citizens or aliens. The court does not select aliens, as a class, as the source of evil.

A layman who makes a business of giving legal advice on foreign law, is not subject to the supervision and control of the courts and to its disciplinary action; such a layman need not even be a lawyer of any foreign jurisdiction; he may even be without good character; he may not or cannot relate his advice on foreign law to the whole problem presented, and thus his advice gives utterly inadequate protection (3 N. Y. (2) at p. 232). Thus evil and damage may arise. The public is entitled to the same protection in respect of legal advice on foreign law or domestic law. Therefore only lawyers who are licensed to practice in New York who have met all the required standards, including character standards, and are subject to the rules gov-

erning the admitted lawyer are permitted to make a business of giving advice on foreign law (3 N. Y. (2) at 233).

It is perfectly obvious that in its application of Section 270 of the New York Penal Law to the field of foreign law, the court did not discriminate between the foreign lawyer, the non-foreign lawyer, the citizen or the alien.

All persons, regardless of citizenship or alienage, are prohibited from practicing foreign law if they are not duly licensed members of the New York bar. Thus the public protection, upon which the licensing provisions are based, is preserved, and no discrimination is practiced.

E. Appellant has not been excluded from the practice of foreign law because he does not know New York law.

Appellant erroneously contends that it is necessary to know New York law to be admitted to the New York bar; therefore the requirement is unconstitutional because it bears no reasonable relation to the practice of foreign law (Jurisdictional Statement, pp. 18-26).

If it were necessary to establish such relationship in order to sustain the decision of the New York Court of Appeals, the opinion of the Court below amply demonstrates it.

The Court points out that the lay public is just as liable to injury when an unlicensed person gives advice as to legal rights either under foreign or domestic law (3 N. Y. (2) 224, 231, 233).

Applying the principle expressed in *New York County Lawyers Assn.* vs. *Bercu* (78 N. Y. Supp. (2) 209, 219, 220, 273 App. Div. 524, affd 299 N. Y. 728) that in response to a request for legal advice, that, "essential to the solution of any problem is recognizing all the elements of the problem",

the Court below illustrates the need to relate New York law with advice as to foreign law when it said:

> "To allow a Mexican lawyer to arrange the institution of divorce proceedings for a New York resident in a Mexican court, without allowing him to tell the client that the divorce might be invalid (Querze *v.* Querze, 290 N. Y. 13), or that it might adversely affect estate or other property rights or status in this State (Matter of Rothscheck, 300 N. Y. 346), is to give utterly inadequate protection to him (See 70 Harvard L. Rev. 1112-1113" (2 N. Y. (2) 224, 231).

Appellant, giving advice as to foreign law, is faced with a dilemma which he cannot resolve in favor of his client. If he knows no domestic law, he is unable to relate his advice to domestic law, and thus is unable to consider all the elements of the problem presented to him for advice. If he knows domestic law he, nevertheless, may not advise on all the elements of the problem because that would include giving advice on domestic law, which on his own view would constitute the illegal practice of law. He therefore gives no advice on domestic law and thereby fails, as the Court of Appeals states, to give adequate protection to the public.

The Court of Appeals rejected the argument that there may be areas of foreign law which do not relate to domestic law, or to the status of a member of the public in New York, and therefore there is no reasonable relation between knowledge of domestic law and advice on foreign law. One cannot determine that advice on foreign law has no effect upon the status of New York residents, or upon his rights and obligations under domestic law unless one knows and interprets the domestic law. It follows therefore that when one gives advice on foreign law upon the basis or understanding that such advice does not affect any rights or status under domestic law, advice on domestic law is also

being furnished. Negating the influence of domestic law is just as much advice on domestic law as applying affirmatively some aspect of domestic law.

The New York Court of Appeals recognized the problem when it added to its statement last quoted above:

> "Nor are we in anywise persuaded * * * that there is any difference between the right of a Mexican lawyer to act and advise the public in divorce matters and the right of foreign lawyers generally to act and advise with respect to foreign law" (3 N. Y. (2) 224, 231, 232).

Nevertheless, the New York rule for admission to practice law does not necessarily require that a foreign lawyer have knowledge of New York law as a prerequisite for admission to the bar. The regular New York bar examination may be waived for a foreign lawyer who comes from a country whose jurisprudence is based upon the principles of the English Common Law (Rule VII—Rules of the Court of Appeals for admission of attorneys). The rule recognizes the need for a general degree of knowledge of the law that applies in New York which has inherited the English Common Law. On the other hand, New York does not recognize the legal competence of foreign lawyers who come from countries whose jurisprudence is not based on the English Common Law. In the interest of the public protection these lawyers are required to take the regular bar examinations. A Mexican lawyer would not be exempt from passing the bar examination.

It should be noted too, that even where a foreign lawyer may be admitted without a bar examination, he is required to establish proof of moral character and must be a citizen of the United States (Rule VIII of the Rules of the Court of Appeals for Admission of Attorneys). The fact that he is

a foreign lawyer is not accepted, *ipso facto*, as proof of good character. It is apparent that more than knowledge, legal and general, is required in the interest of protecting the public.

Thus proof of good character, educational requirements, supervision and control of the courts over attorneys who are officers of the Court, and the Court's power to exercise summary jurisdiction of lawyers and their dealings with their clients, and to discipline them when necessary, are all part of the mantle of public protection evolved by the State for the benefit of its public.

These standards are fair and reasonable and compliance therewith is not an unreasonable requirement for the protection of the public when the practice of foreign law is involved.

However, as we have already noted, the appellant cannot complain of the New York requirements, for he has made no application for admission to the bar.

This Court is not confronted with any improper discrimination in the application of Section 270 of the New York Penal Law between aliens and citizens, nor with any improper application of the rules and regulations of New York for admission to the bar.

The police power of the State of New York is properly and fairly exercised in the public protection. The practice of law is properly and fairly regulated in the public interest.

The issues raised by appellant show no violation of the Fourteenth Amendment and no federal question of substance and the appeal should be dismissed.

POINT II.

The decision of the New York Court of Appeals rests on an adequate non-Federal basis and should not be reviewed.

It seems perfectly obvious that the whole tenor of the decision is based upon the public policy of the State of New York to provide a qualified and regulated bar. The opinion clearly points out the danger and damage to the public which may result from allowing unqualified and unregulated persons to practice foreign law in New York.

Having clearly stated that the practice of foreign law is the practice of law in New York (3 N. Y. (2) 224, 228, 229) citing *People v. Alfani* (227 N. Y. 334, 337, 339), *Matter of New York County Lawyers Assn. v. Bercu* (273 App. Div. 524, affd. 299 N. Y. 728), *Matter of Pace* (170 App. Div. 818), *Matter of New York County Lawyers Assn.*, Anonymous (207 Misc. 698), the Court of Appeals holds that such practice of foreign law comes within the meaning and intent of Section 270 of the New York Penal Law, and affirms the orders below which find that appellant violated the Section.

The Court points out the need to require practitioners of foreign law to be admitted to the New York bar for the protection of the public (3 N. Y. (2) 224, 231). It illustrates how the State protects the public in cases involving foreign law, and the liability of, and control over New York attorneys who act in matters of foreign law. It shows that foreign attorneys, or any other laymen, who seek to make a business of practicing foreign law are not subject to the same control exercised over duly admitted lawyers, thereby indicating clearly the lack of public protection when laymen practice foreign law.

It appears from the opinion that the public policy of the State, in its effort to protect the public, would be set at naught if laymen could practice foreign law, without violating Section 270 of the Penal Law.

The construction of said section of the Penal Law of New York is consistent with, and carries out the public policy of the State to protect the public from unqualified and unregulated practitioners of any branch of the law. It holds that the public is entitled to the same protection whether it seeks legal advice on foreign or domestic law. That protection is enacted in the requirements for admission to the bar. They involve proof of compliance with prescribed educational standards, general and specific, good character, citizenship, residence, oath to support the Constitutions of the United States and the State and belief in our form of government (New York Judiciary Law, Secs. 53, 90, 460, 466; Rules of the Court of Appeals of New York for Admission of Attorneys; Rules I to IX; Rule 1 of the New York Rules of Civil Practice).

It is settled law in New York that it is a crime, under Section 270 of the New York Penal Law, to practice law, in *any manner*, without having been duly admitted to the New York bar and taken the Constitutional Oath.

People v. *Alfani*, 227 N. Y. 334;
New York County Lawyers Assn. v. *Bercu*, 273 App. Div. 524, aff'd 299 N. Y. 728.

The theory of public protection, predicated upon compliance with the standards prescribed by the State for a license to practice law, and the control of the Courts over the lawyer, is completely nullified, if any layman could set himself up as a practitioner of foreign law.

Under New York law, a person disbarred in another state will not be licensed to practice law (*Matter of Peters*,

221 App. Div. 607, aff'd 250 N. Y. 595). A person who would resort to force and violence to overthrow the existing form of government, will not be licensed to practice law (*Matter of Cassidy,* 268 App. Div. 282, aff'd 296 N. Y. 926).

On the theory advanced by appellant, New York would be helpless to prevent a disbarred lawyer whether of New York or any other state or country, from setting himself up in the business of giving legal advice and rendering legal services in respect of foreign law. This could not have been the intention of the legislature of New York and it is so held by the opinion of the New York Court of Appeals.

It has been demonstrated under Point I that the state has the sole right to authorize licensing of the practice of law.

The determination of the Court of Appeals of New York rests on adequate state grounds and on a non-federal basis. It should not be reviewed.

Williams v. *Kaiser,* 323 U. S. 471, 477; *Holly* v. *Lawrence,* 317 U. S. 518.

The decision involves the construction of local law, and not a federal question.

Black v. *Cutter Laboratories,* 351 U. S. 292, 299.

The appeal should be dismissed.

POINT III.

This appeal was improperly taken under Title 28, U. S. C. Sec. 1257 (2), and should be dismissed.

Appellant has pursued the wrong procedure by taking an appeal under Title 28, U. S. C. Sec. 1257 (2).

Appellant did not claim, in the courts of New York, that Sec. 270 of the Penal Law of New York, as it stands, violated the Constitution of the United States. His claim was that if the Court construed said Section to include the practice of foreign law, and applied such construction to him, he would be deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

His claim then, is really based upon the assertion of a right, privilege or immunity under federal law, in which case the decision against him can be reviewed only by certiorari, under Title 28, U. S. C. Sec. 1257 (3).

Charleston Federal Savings & Loan Assn. v. *Alderson*, 324 U. S. 182, 185;

Jett Bros. Distilling Co. v. *Carrollton*, 252 U. S. 1;

Mergenthaler Linotype Co. v. *Davis*, 251 U. S. 256, 259.

This Court said, in *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, 259, on motion to dismiss a writ of error for which appeal has now been substituted:

> "The claim that the lease contract was made in the course of interstate commerce and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it but asserted a 'title, right, privilege or immunity' under the Fed-

eral Constitution which might afford basis for certiorari but constitutes no ground for writ of error from this court."

The appeal was improperly taken and should be dismissed.

If the Court should consider appellant's appeal as if it were an application for a writ of certiorari, it should be denied upon the same grounds urged for dismissal of the appeal.

Conclusion.

The appeal should be dismissed.

Respectfully submitted,

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